U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF I-T- CORP

DATE: JUNE 22, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a fertilizer trading company, seeks to employ the Beneficiary as a market research analyst. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition, concluding that the job opportunity offered to the Beneficiary was not clearly open to U.S. workers, because the Beneficiary is the niece of the sole shareholder of the Petitioner. The Director also determined that the Petitioner did not disclose the familial relationship between the Beneficiary and the Petitioner's sole shareholder on the labor certification; that the Petitioner paid for the Beneficiary's education; and that the Petitioner did not disclose that it paid for the Beneficiary's education on the labor certification. The Director also invalidated the labor certification based on the willful misrepresentations of the Petitioner on the labor certification.[1]

On appeal, the Petitioner submits additional evidence and asserts that there is no familial relationship between the Beneficiary and the Petitioner's sole shareholder; that the funds used to pay for the Beneficiary's education were paid out of the Beneficiary's earnings with the Petitioner; and that the Petitioner did not make any willful misrepresentations on the labor certification.

Upon *de novo* review, we will dismiss the appeal.

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[1] The regulation at 20 C.F.R. § 656.30(d) provides that a labor certification is subject to invalidation upon a determination of fraud or willful misrepresentation of a material fact involving the labor certification application.

I. LAW AND ANALYSIS

A. Employment-Based Immigration

Employment-based immigration generally follows a three-step process. First, an employer must obtain an approved labor certification from the U.S. Department of Labor (DOL).[2] *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer may file an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national may apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

B. The *Bona Fides* of the Job Opportunity

Labor certification employers must attest that "[t]he job opportunity has been and is clearly open to any U.S. worker." 20 C.F.R. § 656.10(c)(8). "This provision infuses the recruitment process with the requirement of a *bona fide* job opportunity: not merely a test of the job market." *Matter of Modular Container Sys., Inc.*, 89-INA-228, 1991 WL 223955, *7 (BALCA July 16, 1991) *(en banc)* (referring to the former, identical regulation at 20 C.F.R. § 656.20(c)(8)).

We may deny a petition accompanied by a labor certification that violates DOL regulations. *See Sunoco Energy Dev. Co.*, 17 I&N Dec. 283, 284 (Reg'l Comm'r 1979) (affirming a petition's denial where the accompanying labor certification was invalid for the geographical area of intended employment).

To provide an "opportunity to evaluate whether the job opportunity has been and is clearly open to qualified U.S. workers, an employer must disclose any familial relationship(s) between the foreign worker and the owners, stockholders, partners, corporate officers, and incorporators by marking 'yes' to Question C.9 on the ETA Form 9089." DOL, Office of Foreign Labor Certification, "OFLC Frequently Asked Questions & Answers," "Familial Relationships," at http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm (last visited June 21, 2017). A familial relationship includes any relationship established by blood, marriage, or adoption. *Id.*

In determining the *bona fides* of a job opportunity, adjudicators must consider multiple factors, including but not limited to, whether a foreign national: is in a position to control or influence hiring decisions regarding the offered position; is related to corporate directors, officers, or employees; incorporated or founded the company; has an ownership interest in it; is involved in the management

[2] The date the labor certification is filed, in cases such as this one, is called the "priority date." *See* 8 C.F.R. § 204.5(d). In this case, the priority date is April 21, 2015.

of the company; sits on its board of directors; is one of a small group of employees; and has qualifications matching specialized or unusual job duties or requirements stated in the labor certification. *Modular Container*, 1991 WL 223955 at *8; 20 C.F.R. § 656.17(l) (describing the documents required to establish the existence of a *bona fide* job opportunity).

In this case, the Petitioner attested on the accompanying labor certification that "[t]he job opportunity has been and is clearly open to any qualified United States worker." Part C.9 on the ETA Form 9089 also asked: "Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the alien?" The Petitioner responded: "No."

The Director determined that the record established that the Beneficiary was the niece of the sole shareholder of the Petitioner, and that the Petitioner did not disclose the familial relationship on the labor certification. The Director invalidated the labor certification based, in part, on the willful misrepresentation of the Petitioner at Part C.9. of the labor certification.[3] The Director noted the Beneficiary's Forms I-20, Certificates for Eligibility for Nonimmigrant (F-1) Status, for 2006, 2008, and 2009, signed by the Beneficiary which stated that the Petitioner's sole shareholder was the Beneficiary's uncle and that he was covering her academic expenses.[4]

On appeal, the Petitioner submits birth certificates of the Beneficiary, her parents, and the Petitioner's sole shareholder, together with affidavits. They establish that the Petitioner's sole shareholder is not the biological uncle of the Beneficiary. Thus, the appellate record indicates that a familial relationship does not exist between the Beneficiary and the Petitioner's sole shareholder.

Based on consideration of the *Modular Container* factors and the facts of this case, the record establishes the existence of a *bona fide* job opportunity. While the petition identifies the Beneficiary as part of a group of 14 employees, the record does not indicate the Beneficiary's involvement in the Petitioner's management or that she is in a position to control or influence hiring decisions regarding the offered position. It also does not indicate that she has an ownership interest in the Petitioner or that she sits on its board of directors. We will therefore withdraw the Director's finding that the job offer was not *bona fide*. The Petitioner did not misrepresent its answer to Part C.9. on the labor certification. Thus, we also withdraw the Director's finding that the Petitioner willfully misrepresented its response to Part C.9. on the labor certification. The next section addresses the Director's finding that the Petitioner willfully misrepresented its answer to Part J.22.

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[3] Willful misrepresentation involves willfully making a false representation to a U.S. government official about a material fact while attempting to obtain an immigration benefit. *See* section 212(a)(6)(C)(i) of the Act; *see also Matter of Tijam*, 22 I&N Dec. 408, 424 (BIA 1998); *Matter of Y-G-*, 20 I&N Dec. 794 (BIA 1994). To be considered material, the misrepresentation must be one which "tends to shut off a line of inquiry which is relevant to the alien's eligibility, and which might well have resulted in a proper determination that he be excluded." *Matter of Ng*, 17 I&N Dec. 536, 537 (BIA 1980).

[4] As the Beneficiary has affirmed that the Petitioner's sole shareholder is not her uncle, it appears that she willfully misrepresented the nature of her relationship with him on her Forms I-20.

C. Actual Minimum Requirements

The labor certification in this case states that the offered position requires a master's degree in marketing or business economics. Pursuant to 20 C.F.R. § 656.17(i)(1), the job requirements described on the labor certification must represent the Petitioner's actual minimum requirements for the job opportunity. In evaluating whether a beneficiary satisfies the Petitioner's actual minimum requirements, DOL will not consider any education or training received by the beneficiary at the petitioner's expense unless the employer offers similar training to domestic worker applicants. 20 C.F.R. § 656.17(i)(4).[5]

Part J.22. of the labor certification asks whether the Petitioner paid for any of the Beneficiary's education or training necessary to satisfy any of the Petitioner's job requirements. The Petitioner responded "No." However, the record indicates that the Petitioner made direct payments to [redacted] to pay the Beneficiary's tuition for her master's degree program. Thus, the Petitioner should have checked "yes" to Part J.22.[6]

The Beneficiary attended the master's program at [redacted] from the fall of 2009 to the summer of 2011. She took one master's course in the fall of 2009; four in the spring of 2010; three in the fall of 2010; two in the spring of 2011; and one on the summer of 2011. Her master of science degree was issued on September 1, 2011. Her IRS Forms W-2 indicate that she earned $33,236.20, $35,740.00 and $35,740.00 in 2009, 2010, and 2011, respectively. The Petitioner paid the following amounts directly to [redacted] to cover the Beneficiary's tuition for her master's degree: $7,090.10 in 2009; $8,905.20 in 2010; and $1,940.85 in 2011.

The Petitioner asserts that the payments to [redacted] were part of the Beneficiary's salary. It asserts that the Beneficiary worked during the day for the Petitioner performing bookkeeping and administrative duties, and attended master's degree classes in the late afternoons and evenings.[7] However, the record does not establish whether the tuition payments were made as part of a defined plan under Internal Revenue Code (IRC) § 127, whether they were made as working condition fringe benefits under IRC § 132, or whether the payments were omitted from her Form W-2 wages for some other purpose. Further, the record does not contain the Petitioner's tax returns for 2009, 2010, or 2011, which would have established whether the Petitioner deducted the tuition payments as a business expense each year, or whether the tuition payments were otherwise reflected on the returns.

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[5] An employer is not permitted to treat a foreign worker more favorably than it would a U.S. worker.

[6] The DOL could not properly assess the actual minimum requirements for the offered job, and could not determine whether the Beneficiary was actually qualified for the job, based on its answer to Part J.22.

[7] The Petitioner has not provided evidence establishing her master's course schedule (days and times) in any semester. The Petitioner must support assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). It is not clear how the Beneficiary could have maintained a full-time job and completed four master's classes in the spring of 2010, or three classes in the fall of 2010. The Petitioner must resolve the ambiguities with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The Petitioner must support assertions with relevant, probative, and credible evidence. *See Chawathe*, 25 I&N Dec. at 376. It has not done so in this case.

The Petitioner asserts that the Beneficiary "earned a reduced salary so that the Petitioner could pay the tuition on her behalf out of her earned salary." The Beneficiary asserts in an affidavit that if the Petitioner "did not pay my tuition to the school on my behalf, my salary would have been significantly higher and I, in turn, would have paid the school directly. I would never have worked for a salary of $35K based upon my education and the work I performed for the company." The Petitioner claims that three other employees were employed in the same capacity as the Beneficiary and earned more than the Beneficiary, excluding the tuition payments purportedly made on her behalf. However, the record does not contain evidence establishing that the other employees were employed full-time performing bookkeeping and administrative duties, or that they had similar education, experience, and performance as the Beneficiary which would warrant similar wages.[8] The Petitioner must support assertions with relevant, probative, and credible evidence. *Id.* It did not do so in this case.

Further, on Form G-325, Biographic Information, submitted with the Beneficiary's adjustment of status application, the Beneficiary listed employment with the Petitioner as a market research analyst from October 2012 to the date she signed the Form G-325 on January 20, 2016. She did not list employment with the Petitioner prior to 2012, although the form required her to list employment for the "last five years" which should have included her employment with the petitioner from January 2011 onward. Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Ho*, 19 I&N Dec. at 591.

For these reasons, we find that the Petitioner impermissibly treated the Beneficiary more favorably than U.S. workers and that the labor certification does not state the actual minimum requirements for the offered position. This conclusion is based on the fact that the labor certification required U.S. workers to possess a master's degree in order to qualify for the offered position, but the Petitioner paid for the Beneficiary's qualifying education. In addition, we agree with the Director's conclusion that the Petitioner willfully misrepresented its answer to Part J.22. of the labor certification, as the Petitioner made direct tuition payments to [redacted] on the Beneficiary's behalf, and that this misrepresentation was material to the adjudication of the labor certification and the petition. Therefore, the petition will remain denied and the labor certification will remain invalidated.

[8] The Petitioner's quarterly state tax returns showing their wages do not detail their duties, education, experience, or performance ratings. The Petitioner asserts that "all employees are never paid exactly the same amount due to the number of years they have been on the job and performance," but it does not provide evidence establishing the number of years the similarly-employed employees had been employed, or detail their performance during those years.

D. Ability to Pay the Proffered Wage

Although not addressed by the Director, the record does not establish that the Petitioner has the continuing ability to pay the proffered wage from the priority date. The proffered wage is $142,792 per year.

The regulation at 8 C.F.R. § 204.5(g)(2) requires a petitioner to provide evidence that it has the ability to pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. *Id.* In this case, the record does not contain an annual report, federal tax return, or audited financial statements for the Petitioner for 2015 as required by 8 C.F.R. § 204.5(g)(2).[9] Thus, the Petitioner has not established its continuing ability to pay the proffered wage from the priority onward.

II. CONCLUSION

The Petitioner has established that the job offer was *bona fide*. However, the Petitioner has not established that the labor certification represented the actual minimum requirements for the job opportunity. The Petitioner willfully misrepresented its answer to Part J.22. of the labor certification and, therefore, the labor certification shall remain invalidated. Additionally, the Petitioner has not established its continuing ability to pay the proffered wage from the priority date onward.

ORDER: The appeal is dismissed.

Cite as *Matter of I-T- Corp*, ID# 292636 (AAO June 22, 2017)

[9] The record contains the Petitioner's federal tax return for 2014 and the Beneficiary's IRS Forms W-2, Wage and Tax Statements, issued by the Petitioner in 2009, 2010, 2011, 2013, 2014, and 2015.